Filed 4/26/19 P. v. Shelley CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEROY JOSEPH SHELLEY,

Defendant and Appellant.

B286984

(Los Angeles County Super. Ct. No. LA084199)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrea C. Thompson, Judge. Affirmed in part, reversed in part.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Leroy Joseph Shelley appeals following his conviction on two counts of driving under the influence of alcohol (DUI), in violation of Vehicle Code section 23152, subdivision (a).[1] The parties concede, and we agree, that the conduct at issue here should have resulted in one, and not two, DUI convictions and accordingly reverse the second count of conviction.

Shelley further argues his remaining count of conviction should be reversed based on the erroneous admission of certain facts about one of his prior DUI's, and the prosecutor's alleged misstatement of the reasonable doubt standard during closing argument. We disagree with those contentions for the reasons set forth below.

BACKGROUND

A. 2016 DUI Investigation

On August 1, 2016, at about 12:47 a.m., California Highway Patrol Officer Scott Bemiller and his partner noticed a black Nissan Cube driving north on Highway 170. The Nissan caught their attention because it was going slower than traffic, and was in the right exit lane but had its left blinker on. The officers then saw the car suddenly make a left-lane change over the gore point.[2] In making that lane change, the Nissan forced another car to switch lanes quickly to avoid a collision. The Nissan then sped up to over 80 miles per hour, at which point the officers initiated a traffic stop.

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[1] All further statutory references, unless otherwise noted, are to the Vehicle Code.

[2] A gore point is a division (typically triangular) between a branching off exit lane and the main lanes of a highway.

When the Nissan pulled over, Officer Bemiller walked up to the driver's window, saw defendant Shelley in the driver's seat, and immediately smelled a strong odor of alcohol emanating from the car. The officer noticed that Shelley's eyes were red and watery, and his speech was slurred. Officer Bemiller asked Shelley if he had anything to drink that night, and Shelley said he had not. Shelley said he was very tired, because he had woken up at 3:45 a.m. and worked a 12-hour shift.

As Shelley stayed in the car, Officer Bemiller conducted a preliminary test to see if Shelley's eyes showed a lack of smooth pursuit or nystagmus (potential indicators of intoxication), and observed both. Officer Bemiller decided to conduct a complete DUI investigation, and asked Shelley to step out of the vehicle. As Shelley walked towards the sidewalk, Officer Bemiller noticed he had an unsteady gait. Shelley told the officer he had foot and knee problems that hindered his mobility.

As Officer Bemiller stood closer to Shelley, he smelled a strong odor of alcohol on Shelley's breath. The officer told Shelley not to lie, and asked again whether Shelley had been drinking that night. Shelley responded this time that he drank a 24-ounce beer at his sister's house about 30 minutes prior to the traffic stop.

Officer Bemiller then conducted four field sobriety tests (FST's): the horizontal gaze nystagmus, the one-leg stand, the walk-and-turn, and a modified Romberg test involving time estimation. Each test has a set of "clues" that help officers determine whether a person is likely under the influence of alcohol. Shelley performed unsatisfactorily on all four FST's. He had a lack of smooth pursuit and nystagmus in his eyes during the horizontal gaze nystagmus test, and exhibited six out of the six possible clues that test can elicit. On the one-leg stand test, Shelley exhibited three out of four possible clues—he put his foot on the ground twice, swayed from side to side, and lifted his arms for balance. On the walk-and-turn test, Shelley exhibited five out of eight clues when he lost his balance while receiving the instructions for the test, failed to turn the way he was instructed, stepped off the line, missed heel-to-toe contact several times, and used his arms for balance. Finally, on the modified Romberg test, it took Shelley 35 seconds to estimate 30 seconds in his head, which although not unreasonable, was on the slower end of acceptable according to Officer Bemiller.

After witnessing Shelley's driving, behavior, and performance during the four FST's, Officer Bemiller determined Shelley was under the influence of alcohol and was too intoxicated to drive. Before arresting him, however, Officer Bemiller asked Shelley if he would take a preliminary alcohol screening (PAS) test to help the officer further determine whether Shelley was under the influence. The officer explained that the test would measure the alcohol level on his breath, that it was not mandatory, and that Shelley could refuse to take it. Officer Bemiller also warned Shelley that if he was arrested, Shelley would be required to give a blood or breath sample to determine his blood's alcohol content level. Shelley repeatedly told the officer he did not understand the PAS test and kept asking for clarification. Among other things, Shelley said, "Can you clarify that?"; "Um, I don't because I don't really understand."; "And what determines on the test?"; "So what's the level then?"; "I don't understand the level. So I don't know . . .";

“I don’t understand it.”; “I don’t understand the test.”; and “I don’t know this.”

After about five minutes of this back and forth, in which Shelley continued to say he did not understand and had more questions, Officer Bemiller arrested Shelley. As he was being arrested, Shelley said he would take the PAS test; the officer testified at trial he did not then administer the test because the test was no longer available following arrest.

As soon as he was placed under arrest, Shelley told the officers he was having chest pain and needed paramedics. He was transported to the hospital, where Officer Bemiller testified Shelley was belligerent, refused to answer the medical staff’s questions, and urinated on the floor while medical staff were present. While at the hospital, Officer Bemiller admonished Shelley that he was required by law to submit to a chemical test to determine the alcohol content in his blood. Shelley was told he could pick between a blood or breath test, but that only the blood test was available at the hospital. Officer Bemiller told Shelley that if he refused, his failure to complete the test could be used against him in court and could lead to a suspension of his license. Shelley refused to take the blood test.

After about two hours, Shelley was released from the hospital, and transported to jail. Upon arrival at the jail, where both the breath and the blood tests were available, Officer Bemiller re-read Shelley the admonition that he was required by law to submit to a chemical test, and that his failure to do so could be used against him in court. Shelley again refused to take any type of chemical test.

B. 2009 DUI Investigation

On January 6, 2009, Shelley was pulled over and investigated for a DUI. During that stop, Shelley told officers he had drunk part of a 24-ounce beer earlier that evening. The deputy sheriff that conducted the traffic stop explained the PAS test to Shelley, told him it was not mandatory, and asked if he would take it. Shelley replied that he understood the test and provided two adequate breath samples. Those samples showed a blood alcohol content in excess of the legal limit. Shelley was thereafter arrested and convicted of DUI.

C. Charges For the 2016 Incident

Following his August 1, 2016 arrest, Shelley was charged with two counts of driving under the influence of alcohol, in violation of section 23152, subdivision (a). The charges differed in that each cited a different sentencing enhancement statute. Count one charged Shelley with driving under the influence of alcohol within 10 years of a felony DUI or a vehicular manslaughter, in violation of sections 23152, subdivision (a) and 23550.5. Count two charged him with driving under the influence of alcohol within 10 years of three other DUI offenses, regardless of whether they were misdemeanors or felonies, in violation of sections 23152, subdivision (a) and 23550. The information further alleged that Shelley had suffered two prior strike convictions (Pen. Code, §§ 667, subds. (b)−(d), 1170.12).

The trial court granted Shelley's motion to bifurcate the prior conviction allegations, and submitted only one of the two counts to the jury.

D. Trial Proceedings

1. Introduction of 2009 DUI Investigation to Show Knowledge of PAS Test

The prosecutor sought to introduce at trial facts concerning the 2009 DUI investigation, arrest, and conviction to show Shelley's consciousness of guilt when saying he did not understand the PAS test, and in refusing to take chemical tests after the 2016 DUI arrest. The People argued the 2009 incident helped demonstrate that in 2016, Shelley was not in fact confused about the PAS test or had any medical emergency following arrest, but was instead stalling for time to sober up. Shelley's counsel opposed admission of any facts concerning the 2009 DUI incident.

The court heard argument from both parties over the course of three hearings. The court ultimately decided to admit the fact that Shelley took a PAS test in 2009, and that he understood the test at that time. The court excluded any evidence of the 2009 PAS test results, as well as any evidence that Shelley was thereafter arrested and convicted of a DUI. In making its ruling, the court indicated it had considered Evidence Code section 1101, subdivision (b), as well as Evidence Code section 352. The court found Shelley's taking of a PAS test in 2009, and his statements at that time he understood the test, was more probative than prejudicial and could be introduced for the limited purpose of showing Shelley's knowledge of the test that he claimed not to understand in 2016.

The court instructed the jury before the 2009 evidence was introduced that it was being offered for a limited purpose, namely "to prove knowledge regarding a subject matter that is about to come up regarding one of the tests," and that that was "the only purpose [the jury should] consider it for." The jury was further instructed that it could not conclude from the 2009 evidence that Shelley had any propensity to drive under the influence.

In its final instructions, the court again instructed the jury that it could only consider the 2009 evidence "for the limited purpose of deciding whether the defendant had prior knowledge of the Preliminary Alcohol Screening, (PAS), test." It told the jury: "In evaluating this evidence, consider the similarity or lack of similarity between the uncharged conduct and the charged conduct. Do not consider this evidence for any other purpose, except for the limited purpose of prior knowledge of the PAS test. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime."

Based in part on the 2009 evidence admitted at trial, the prosecutor argued to the jury that Shelley was pretending not to understand the PAS test in 2016 to stall the investigation of how far over the legal blood alcohol content limit he was. In other words, she argued his feigned confusion about the PAS test showed consciousness of guilt.

2. Failure to Take Any Chemical Tests After Arrest

With regard to testimony that Shelley refused to take any tests *after* his arrest, the Court instructed the jury that "the law requires that any driver who has been lawfully arrested submit to a chemical test at the request of a peace officer who has reasonable cause to believe that the person arrested was driving under the influence. If the defendant refused to submit to such a test after a peace officer asked him to do so and explained the test's nature to the defendant, then the defendant's conduct may show that he was aware of his guilt."

3. Closing Argument

Prior to closing argument, the court instructed the jury that it must follow the law as the court explained it, and that if the attorneys' comments on the law conflicted with the court's instructions, the jury must follow the court's instructions. The court defined the reasonable doubt standard, telling the jury that the proof must leave it with an abiding conviction that the charge is true. It also instructed the jury that nothing the attorneys said in their opening statements or closing arguments was evidence.

During the People's closing argument, the prosecutor argued as follows:

"PROSECUTOR: Let's say there's a guy who orders an Uber, because he needs to go to the airport, and he sees from down the street the car's approaching, kind of goes across the other lane, speeds up all of a sudden, comes into the driveway, is going too fast. The driver gets out of the car, walks toward the door, and this guy notices he looks a little bit off balanced, his eyes are red and watery. He gets closer, this guy notices that this driver's breath reeks of alcohol, and he says, 'Hey, have you been drinking?' and the driver of course says, 'No. Of course not. I haven't been drinking.'

"And then the guy says, 'Well, you know what, I can really smell it on your breath.' Then he says, 'Okay, I was at my sister's house. I had 24 ounces of beer.'

"Then the guy asks him, 'Okay, well, will you take one of these tests to show me that you're not, like, over the legal limit, haven't been drinking too much?' And the driver says, 'No. I ain't taking no test.'

"Would it be reasonable for that guy to get into that car with that driver? Of course not. It's not reasonable. Because that guy knows that driver, beyond any reasonable doubt, is under the influence of alcohol.

"DEFENSE COUNSEL: I'm sorry, I have to object to this line. I think it's confusing, and it misstates the law, and it's inappropriate.

"THE COURT: All right. This is argument. It is not evidence. And the jurors—the objection is overruled. The jurors are reminded, once again, that it is their recollection of the evidence that controls, and that argument of counsel is not evidence.

"PROSECUTOR: It's not reasonable for that guy to get into the car with that driver, because he knows, beyond a reasonable doubt, that driver is under the influence of alcohol. Just like we know that defendant was under the influence of alcohol on that night, and that's why he's guilty of this offense. Thank you."

D. Conviction and Sentencing

The jury found Shelley guilty of driving under the influence, in violation of section 23152, subdivision (a). A court trial was then held on the prior conviction allegations, which were found true. As part of this hearing, the court further found Shelley guilty of the additional count with which he was charged as it included one of the charged sentencing enhancements. Shelley was sentenced on count one to a total of six years in state prison. The trial court imposed the same six-year term on count two, but stayed it under Penal Code section 654.

DISCUSSION

A. There Should Have Been One, Not Two, Counts of Conviction

Shelley contends, the People concede, and we agree that Shelley should have been charged and convicted of only one count of driving under the influence, rather than the two. Both parties agree that count two—the section 23152, subdivision (a) violation with the section 23550 sentencing enhancement—should be stricken, and the section 23550 sentencing enhancement should instead be considered as part of count one. We accordingly reverse the conviction on count two, and remand for correction of the minute orders and abstract of judgment.

B. The Court Did Not Err in Admitting Limited Evidence from the 2009 DUI Investigation

Shelley argues that the court erred in admitting evidence that he understood and took a PAS test in 2009. We find no abuse of discretion in the admission of this evidence, and no resulting improper prejudice.

1. Standard of Review

We review the trial court's evidentiary rulings for abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) If we find an abuse of discretion, we look to see whether the error was harmless. (*People v. Jackson* (2010) 189 Cal.App.4th 1461, 1469–1470 [if the court finds there was an abuse of discretion, it must look to see whether it was " 'reasonably probable that a result more favorable to [defendant] would have been reached' had such evidence not been admitted"].)

2. Shelley Waived the Argument that His Refusal to Take the PAS Test in 2016 Was Inadmissible

As a preliminary matter, although Shelley additionally argues error in the admission of evidence regarding the request to take a PAS test before the 2016 arrest and his purported confusion in response to that request, he waived that argument by not objecting below. An appellate court cannot set aside a ruling on the admission of evidence unless there appears on record a timely "objection to or a motion to exclude or to strike the evidence . . . ." (Evid. Code, § 353, subd. (a).) While defense counsel steadfastly objected to the admission of the 2009 PAS test and related facts, she did not object to the admission of Shelley's 2016 refusal to take the PAS test, which was part of a police dashcam video along with other evidence of defendant's statements and actions that evening. Shelley argues his objection was made and preserved when his counsel said, "PAS never comes in any longer. It's not allowed at trial. It's not competent evidence is my understanding." That statement, however was made in the context of an argument against admitting evidence of the 2009 incident, including the 2009 PAS test. It did not state an objection to the 2016 evidence.[3]

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[3] Indeed, counsel's comments during the arguments over the 2009 evidence appeared to concede the back and forth between Officer Besmiller and Shelley in 2016 about the PAS test was admissible.

Accordingly, Shelley waived the argument that his 2016 colloquy with Officer Bemiller about the PAS test was inadmissible. Even if Shelley had objected to evidence of his questions about the PAS test, and the court had admitted the evidence over his objection, any error would have been harmless. Shelley also refused a mandatory chemical test after his arrest, and that refusal was admissible to show consciousness of guilt. (See CALCRIM No. 2130 as given by the trial court: "If the defendant refused to submit to such a test after a peace officer asked (him . . .) to do so and explained the test's nature to the defendant, then the defendant's conduct may show that (he . . .) was aware of (his . . .) guilt."].) Admission of evidence about Shelley's numerous questions about the PAS test in 2016 before his arrest (followed by his offer after arrest to take the test, which Officer Bemiller refused) did not have any impact on the jury distinct from indisputably admissible evidence regarding his refusal to take any chemical test. (See *People v. Wilson* (2003) 114 Cal.App.4th 953, 958−960 [clarifying that postarrest chemical tests are more reliable than PAS test, which is why Legislature made chemical tests, rather than PAS test, mandatory, and that jury *must* be instructed about defendant's refusal of chemical tests].)

3. The Court Did Not Abuse its Discretion in Admitting Certain Facts Regarding the 2009 DUI Investigation

Evidence Code section 1101, subdivision (b) permits the admission of a defendant's previous act when it is relevant to prove some fact other than the defendant's disposition to commit such an act, such as motive, intent, plan, knowledge, or absence of mistake. Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice . . . ." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "The chief elements of probative value are relevance, materiality and necessity." (*People v. Schader* (1969) 71 Cal.2d 761, 774.) "Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

The trial court denied the prosecution's request to admit all facts regarding the 2009 DUI arrest and conviction, and found that only evidence Shelley had understood and taken a PAS test in 2009 was admissible, and that it was admissible only to show he had knowledge of how the PAS test worked. The court also decided the statement Shelley made to officers at his 2009 stop that he had consumed part of a 24-ounce beer was relevant to show that he had understood the PAS test under a nearly identical state of mind to that of August 1, 2016. The court made clear to the jury that the evidence was not being introduced to show a disposition to drive while intoxicated or to prove his conduct in 2009, but rather to prove his knowledge of the test he repeatedly told officers he did not understand.

As consciousness of guilt was an important issue in the absence of any chemical test, the court did not abuse its discretion in finding the 2009 evidence it admitted probative. (See *People v. Ortiz* (2003) 109 Cal.App.4th 104 [defendant's five previous DUI convictions admissible to show he knew dangers of driving recklessly]; see also *People v. Hendrix* (2013) 214 Cal.App.4th 216, 242 [if evidence of prior circumstances similar enough, prosecution able to introduce defendant's prior interaction with law enforcement to debunk defendant's contention he did not know he was using force against a police officer in current case].) The 2009 evidence was also probative because the People had the burden to establish the defendant knowingly and intelligently refused chemical tests after the 2016 arrest, and Shelley (in the course of telling the officers he did not understand the PAS test) had asked officers about the chemical test when the officers explained the PAS test was not required, but a postarrest chemical test was.

Nor did the trial court abuse its discretion in finding the evidence was not unduly prejudicial. It noted that DUI investigations happen on a regular basis, and that they do not necessarily result in an arrest or conviction. Since the court decided not to admit any evidence about the 2009 test's result or the subsequent arrest and conviction, the jury would not know, and was told not to question, whether Shelley was actually under the influence of alcohol at the 2009 stop. The court also determined evidence that Shelley had understood and taken a PAS test in 2009 was no more inflammatory than the charges in the 2016 case. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 993–994.)

The court also safeguarded against any undue prejudicial effect by giving the jury a limiting instruction when the evidence was being presented, and again before closing arguments. The court explained to the jury that they could only consider the 2009 investigation as it related to Shelley's knowledge of the PAS test, and not for any other purpose, including for Shelley's propensity to commit a crime.

We accordingly conclude that the court did not abuse its discretion in finding the questioned evidence more probative than unduly prejudicial.

C. The Prosecutor's Rebuttal Argument Was Not Improper

Shelley argues the prosecutor improperly diluted the reasonable doubt standard during closing argument when using the Uber analogy described above. He relies on cases that disapprove descriptions to the jury of the reasonable doubt standard. Those cases are distinguishable, because in them either a court or the prosecutor compared the reasonable doubt standard to making everyday decisions such as where to get lunch, whether to cross the road, or whether to get married.

The prosecutor here did not make that kind of comparison. In fact, the prosecutor did not actually try to explain the standard at all; instead, she listed several facts of the case by way of a hypothetical, and argued the driver in the hypothetical was under the influence of alcohol beyond any reasonable doubt. The jury was further admonished that counsel's statements were argument, and the jurors were to apply the law as given to them by the court. While aspects of the prosecutor's closing may have been more precisely phrased, we find no prejudicial misconduct.

1. Standard of Review

We review any prosecutorial misconduct of making improper arguments in front of the jury for prejudice. (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268.)

2. The Prosecutor Did Not Equate a Decision Under the Reasonable Doubt Standard to an Everyday Decision

Shelley compares the prosecutor's Uber driver analogy to the explanations of the reasonable doubt standard in *People v. Johnson* (2004) 115 Cal.App.4th 1169 (*Johnson I*) and *People v. Johnson* (2004) 119 Cal.App.4th 976 (*Johnson II*). First, in both *Johnson I* and *II* it was the trial court, not the prosecutor, who gave the jury incorrect definitions of the standard.[4] Second, the way the trial court explained the standard in the *Johnson* cases had nothing to do with the facts in those cases. The courts instead equated making a decision under a reasonable doubt standard to making an everyday, common decision.

In *Johnson I*, the trial court told the jury that making a decision under the reasonable doubt standard is like deciding to plan a vacation, because we plan a vacation believing beyond a reasonable doubt that we will be alive when the vacation is to take place. (*Johnson I*, *supra*, 115 Cal.App.4th at p. 1171.) In *Johnson II* (a case unrelated to *Johnson I*), the court explained the standard by asking each juror, one by one, about decisions they made in their lives, both trivial and important, such as deciding where to go to lunch, whether to cross the street, whether to have children, or whether to go college. (*Johnson II*, *supra*, 119 Cal.App.4th at pp. 979–982.) The court emphasized

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[4] In *Johnson II*, the prosecutor repeated the trial court's definition of the reasonable doubt standard during closing argument; however, the court only reversed the judgment because of the trial court's discussion of the standard. (119 Cal.App.4th at pp. 985–986.)

that in every decision the jurors had ever made they had to have had *some* doubt, and that deciding the case would be like making the "kind of decisions [they] make every day in [their] li[ves]." (*Id.* at pp. 982−983.) The court said that if the jurors found defendant guilty without *any* doubt, they were "brain dead." (*Id.* at p. 980.)

In the other case on which Shelley relies, *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35, the prosecutor compared the reasonable doubt standard to how people make everyday decisions, such as deciding to get married or switching lanes on the freeway. The appellate court found the prosecutor's description of the standard trivialized it, but held the error would have been cured if the defendant had objected and the court had admonished the jury. (*Id.* at p. 36.) The appellate court also held the defendant was not prejudiced by the prosecutor's argument because the prosecutor directed the jury to read the reasonable doubt instruction and the jury was correctly instructed on the standard. (*Id.* at pp. 36−37.)

Here, the prosecutor's argument did not define the reasonable doubt standard by comparing it to unrelated everyday decisions. In fact, the prosecutor did not try to define the reasonable doubt standard at all. Instead, she listed many of the facts in the People's case-in-chief through an analogy, where the driver was an Uber driver rather than Shelley, and said that based on those facts, the Uber driver was under the influence of alcohol beyond a reasonable doubt. Rather than trying to explain what the standard meant, she had "the evident aim of demonstrating [she] had succeeded in proving defendant guilty beyond a reasonable doubt." (*People v. Marshall* (1996) 13 Cal.4th 799, 831−832.)

3. The Prosecutor Did Not Otherwise Dilute the Reasonable Doubt Standard

"Counsel trying to clarify the jury's task by relating it to a more common experience must not imply that the task is less rigorous than the law requires." (*People v. Centeno* (2014) 60 Cal.4th 659, 671.) Counsel cannot misstate the law. (See *Katzenberger*, *supra*, 178 Cal.App.4th at p. 1266.) Prosecutors dilute the reasonable doubt standard if they use arguments that "necessarily draw on the jurors' own knowledge rather than evidence presented at trial" and encourage them to jump to a conclusion. (*Centeno*, *supra*, 60 Cal.4th at p. 669 [prosecutor showed jury an outline of state of California and told jury evaluating evidence of case was like deciding which state was being shown]; see also *Katzenberger*, *supra*, 178 Cal.App.4th at pp. 1266–1267 [prosecutor displayed puzzle of Statute of Liberty with two missing pieces which suggested reasonable doubt standard can be met by jumping to a conclusion].)

The prosecutor here did not ask the jury to jump to a conclusion about the evidence of the case, nor did she misstate the law. She simply argued a reasonable passenger would not get in the car with Shelley (or, in her analogy, the Uber driver) because based on the facts the prosecution had established during trial, many of which the jury saw and heard via the video recorded on the officers' camera, the passenger would know Shelley was under the influence of alcohol beyond a reasonable doubt.

The prosecutor did use the word "reasonable" when asking the jury whether it would be "reasonable" for a passenger to get in the car with the Uber driver after he had exhibited the same behavior as Shelley. While this was arguably an impolitic word choice, she did not say that if the jury decided it was unreasonable for the passenger to get in the Uber driver's car, then they must find the driver was under the influence of alcohol beyond any reasonable doubt. Instead, she told the jury that it would not be reasonable for a passenger to get in the car *because* the driver was under the influence of alcohol beyond any reasonable doubt.

Moreover, if prosecutorial misconduct is found, it is reviewed for prejudice. (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1268.) Even if the prosecutor had improperly explained the standard, Shelley was not prejudiced. His counsel objected to the analogy, and while the court overruled the objection it admonished the jury that closing arguments were not evidence. The court correctly instructed the jury on the reasonable doubt standard and directed the jury to rely only on the court's definition of the standard. " 'When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." ' " (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1268.)

DISPOSITION

The conviction on count one is affirmed. The conviction on count two is reversed. The matter is remanded for the trial court to amend the abstract of judgment and any related minute orders, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

CHANEY, Acting P. J.

BENDIX, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.